RHB BANK BHD

v.

KWANTAS OIL SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
HAMID SULTAN ABU BACKER J
[SUIT NO: D-22-670-1998]
30 SEPTEMBER 2011

BANKING: *Banks and banking business - Forward foreign exchange contracts (FFECs) - FFECs transactions by telephone - Plaintiff bank made tape recordings of transactions - Whether defendants failed to honour FFECs - Failure of defendants to dispute officer's voice in recording at earliest opportunity - Whether defendants' subsequent denial of officer's voice an afterthought and lacking bona fides*

The plaintiff ('RHB') granted the first defendant ('Kwantas Oil') various banking facilities for which the second defendant was the guarantor. Amongst the facilities was a foreign exchange contract limit facility which enabled Kwantas Oil to deal with RHB in forward foreign exchange contracts ('FFECs'). The parties agreed the FFECs would be transacted by telephone. RHB's instant action was to recover, with interest, RM7.9m in losses it suffered as a result of Kwantas Oil's failure to honour two FFECs and the roll-overs associated with them. RHB alleged (i) the contracts were concluded by one Mr. Chin of Kwantas Oil (ii) the tape recordings of the transactions were admissible in evidence (iii) RHB's branch manager, PW2, identified the voices of Mr. Chin and another representative of Kwantas Oil in the recording as he knew them personally (iv) the defendants were estopped from denying Mr. Chin had authority to transact in the FFECs for Kwantas Oil as he had previously done so and (v) an adverse inference should be drawn against Kwantas Oil for failure to call Mr. Chin as a witness. The defendants, *inter alia*,(i) denied Kwantas Oil had concluded the FFECs or had given RHB instructions in respect of the roll-overs (ii) denied Kwantas Oil had authorised Mr. Chin to execute the FFECs on its behalf (iii) alleged that the tape recording of the transaction played in Court was inadmissible as it was an edited and extracted version which was unclear and confusing and (iv) alleged that the recording failed to identify who was speaking for Kwantas Oil.

Held (allowing the claim for RM7,637,020 with interest at 4% per annum from date of filing of the action till settlement, with costs):

(1) The tape recording of the oral transactions was played back to the concerned parties as early as 5 November 1997 but then there was no protest that it was 'Chin' or a wrong person or the like. If the defence was genuine, any reasonable person would have thought a protest was a must and a subsequent police report would have been made in order to deny liability. That did not take place. (para 25)

(2) Many correspondences were exchanged between the parties after the hearing of the tape recording, inclusive of solicitor's demand, but no protest was made in the manner raised in court or in submission, or, for that matter, regarding the quantum. In fact, the managing director of the defendants wrote to settle the matter on terms. (para 25)

(3) The defendants' lengthy argument on the admissibility of the tape recording was a sham. The case could be decided even without the tape recording evidence as the issues raised in defence and in court were not taken at the earliest opportunity. The failure to call Mr. Chin as a witness was also fatal. (para 25)

(4) The defendants' attempt to deny the voice of 'Chin' in the tape recording was an afterthought which essentially destroyed the credibility of their case. (para 25)

(5) As the nature of the transaction was based on an oral contract, contemporaneous objection to any dispute and consistent defence was an essential criterion to weigh the *bona fide* of the defence. (para 2)

Case(s) referred to:

Azlan Alias v. PP [2009] 1 LNS 534 CA ***(refd)***

Bakri Mohamad Ali v. PP [2010] 1 CLJ 610 HC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(refd)***

Chan Yoke Lain v. Pacific & Orient Insurance Co Sdn Bhd [1999] 1 CLJ 179 CA ***(refd)***

Chung Khiaw Bank Ltd v. Soi Huan & Ors [1985] 1 LNS 71 HC ***(refd)***

Citibank NA v. Ooi Boon Leong & Ors [1980] 1 LNS 168 FC ***(refd)***

Gnanasegaran Pararajasingam v. PP [1997] 4 CLJ 6 CA ***(refd)***

Gurbachan Singh v. PP [1966] 1 LNS 57 HC ***(refd)***
Hanafi Mat Hassan v. PP [2006] 3 CLJ 269 CA ***(refd)***
Lim Eng Kay v. Jaafar Mohamed Said [1982] CLJ 298; [1982] CLJ (Rep) 190 FC ***(refd)***
Mohd Ali Jaafar v. PP [1998] 4 CLJ Supp 208 HC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***
Regina v. Maqsud Ali [1966] 1 QB 688 ***(refd)***
Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1996] 3 CLJ 26 CA ***(refd)***
Tan Mooi & Ors v. Tengku Mohd Saad & Ors And Other Appeals [2011] 2 CLJ 145 FC ***(refd)***
Tan Sri Tan Hian Tsin v. PP [1978] 1 LNS 199 FC ***(refd)***
United Overseas Bank (M) Berhad v. Island Palm Trader Sdn Bhd [2000] 8 CLJ 645 HC ***(refd)***
UNP Plywood Sdn Bhd v. HSBC Bank Malaysia Bhd [2010] 5 CLJ 177 CA ***(refd)***
Wong Ai Sung v. Orix Credit Malaysia Sdn Bhd [2007] 4 CLJ 52 HC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 11
Contracts Act 1950, s. 77
Evidence Act 1950, ss. 3(c), 32(1)(b), 63(b), 114(f), (g)
Rules of the High Court 1980, O. 42 r. 12

For the plaintiff - Wong Kian Kheong (Karen Lee with him); M/s Wong Kian Kheong
For the defendants - Mark Ho (Jananee Gopal with him); M/s Chellam Wong

Reported by Ashok Kumar

JUDGMENT

Hamid Sultan Abu Backer J:

[1] This is my judgment in respect of the plaintiff's claim *inter alia* for the sum of RM7,907,838.54 as at 25 February 1998 for the losses suffered resulting from the forward foreign exchange contracts (FFECs) and roll-overs associated with the FFECs.

[2] It must be noted that much disputes in respect of admissibility of tape recorded evidence was raised during trial and submission in relation to one by the name of 'Chin' of the

defendants whom the plaintiff alleges concluded the contract which the defendants dispute his voice as well as his authority. The issue of voice is related to the tape recording and not the authority. The issue of voice was not raised by the defendants in any of the correspondence or communication at the material time after having noticed the claim as well as having heard the tape recording in the manner objected to at the trial and submission. In addition, there was also no police report lodged when the complaint in relation to voice was serious enough to entail police investigation of the plaintiff's claim. In addition, I must say that nature of transaction is based on oral contract and in consequence, contemporaneous objection to any dispute and consistent defence is an essential criterion to weigh the *bona fide* of the defence (see correspondences in pp. 75, 77, 78-79, 82, 84-86, all of encl. 108).

FFECs

[3] The summary of the two FFECs are as follows:

(a) FFEC CP24984 (1st FFEC) for the amount of USD$2,660,000 at the rate of RM2.5455 to USD$1;

(b) 1st roll-over on 29 August 1997 to 5 September 1997 at the rate of RM2.5455 to USD$1;

(c) 2nd roll-over on 5 September 1997 to 30 September 1997 at the rate of RM2.5460 to USD$1;

(d) 3rd roll-over on 30 September 1997 to 29 October 1997 at the rate of RM2.5465 to USD$1;

(e) 4th roll-over on 29 October 1997 to 28 November 1997 at the rate of RM2.5475 to USD$1;

(f) FFEC CP25101 (2nd FFEC) for the amount of USD$5,000,000 at the rate of RM2.5590 to USD$1;

(g) 1st roll-over on 30 September 1997 to 29 October 1997 at the rate of RM2.5595 to USD$1; and

(h) 2nd roll-over on 29 October 1997 to 28 November 1997 at the rate of RM2.5605 to USD$1.

[4] The meaning of Forward Foreign Exchange Contracts has been articulated in the case of *United Overseas Bank (M) Bhd (supra)* and it reads as follows:

Basically, the respondent entered the 'forward foreign exchange contracts' with the petitioner for the purpose of obtaining cover against the risk of a change in the rate of exchange applicable to a foreign currency transaction that is supposed to take place in the near future. Whether one describes this sort of contract as 'forward foreign exchange contracts' or as 'currency hedge contracts' is immaterial or is of no consequence. They both carry with its commercial value of great magnitude. It was held by the English Court of Appeal in the case of *Wilson, Smithett and Cope Ltd v. Terruzzi* [1976] 2 WLR 418 that an exchange contract refers to and is related to a contract where the currency of one country is exchanged for that of another.

A 'forward foreign exchange contract' involves the exchange of two currencies which is to take place in the near future. In such a situation, by virtue of the contract the bank is described as agreeing to buy or to sell foreign currency at an agreed rate of exchange. This brings into sharp focus two important terminologies. The first would be the 'forward selling contract' wherein the bank would agree to deliver to its customer a certain sum of money of a specified foreign currency on a specified fixed date, or during a certain schedule of time, and that sum of money would be at the rate of exchange fixed by the parties at the time the contract is made. An example would be where a New Zealander importer of goods priced in United States dollars desires to fix the amount of the New Zealand currency that will have to be paid. The delivery date of the contract would be scheduled at or approximately at the time the payment becomes due. It is here that the customer's obligation is simply to take the foreign currency and to pay the bank the New Zealand currency equivalent at the time of taking. The second important terminology to consider would be a 'forward buying contract' which essentially means that the bank agrees to buy a specified sum of money in a particular currency for delivery on a fixed date or at a scheduled period of time and at an exchange rate fixed by the parties at the point of time when the agreement is entered.

[5] The learned counsel for the defendants has summarised the facts, issues and the purported undisputed facts as follows:

(a) The defendants admitted executing 1st FFEC and as such judgment has been entered in respect of the same on 2 December 1998, wherein upon the plaintiff's application for assessment of damages of the 1st FFEC, the defendants had paid the plaintiff a total of RM3,237,846.43 on 24 March 1999. The defendants appealed against the said order for assessment of damages to the Court of Appeal, wherein the order for assessment of damages was reversed on 18 March

2010 and the plaintiff was directed to return the total sum of RM3,237,846.43 back to the defendants and to file a fresh application for assessment of damages at the High Court. The parties are now in the midst of exhausting affidavits.

(b) This trial therefore concerns the 2nd FFEC and the alleged roll- overs for the 1st and 2nd FFECs wherein the defendants' defence in summary is as follows:

(i) the 1st defendant never entered into the 2nd FFEC and neither were there any instructions or orders given to the plaintiff in respect of the roll-overs;

(ii) the voices on the alleged tape recording is not that of any representative of the 1st defendant and in particular, they are not the voices of Mr. Chai Foo Yin, also known as Mr. Christopher Chai and Chin Thou Leong (Mr. Chin);

(iii) in any case, Mr. Chin has at all material times not been authorised by the defendants to execute FFEC for the 1st defendant and Mr. Christopher Chai is the only person at that material time, authorised to do so.

[6] The parties have relied on the following cases: *Gnanasegaran a/l Pararajasingam v. Public Prosecutor* [1997] 4 CLJ 6; *Hanafi Mat Hassan v. Public Prosecutor* [2006] 3 CLJ 269; *Azlan Alias v. Public Prosecutor* [2009] 1 LNS 534; *Munusamy Vengadasalam v. Public Prosecutor* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; *Chan Yoke Lain v. Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 CLJ 179; *Citibank N.A v. Ooi Boon Leong & Ors* [1980] 1 LNS 168; *Wong Swee Chin v. Public Prosecutor* [1980] 1 LNS 138; *Tan Mooi & Ors v. Tengku Mohd Saad & Ors and Other Appeals* [2011] 2 CLJ 145; *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544; *Gurbachan Singh v. Public Prosecutor* [1966] 1 LNS 57; *Regina v. Maqsud Ali* [1966] 1 QB 688; *Tan Sri Tan Hian Tsin v. Public Prosecutor* [1978] 1 LNS 199; *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1988] 1 CLJ 793; *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26; *Chung Khiaw Bank Ltd v. Soi Huan & Ors* [1985] 1 LNS 71; *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283; *Lim Eng Kay v. Jaafar Mohamed Said* [1982] CLJ 298; [1982] CLJ (Rep) 190; *United Overseas Bank (M) Bhd v. Island Palm Trader Sdn Bhd* [2000] 8 CLJ 645; *UNP Plywood Sdn Bhd v. HSBC Bank Malaysia Bhd* [2010] 5 CLJ 177; *Mohd Ali Jaafar v.*

PP [1998] 4 CLJ Supp 208; *Bakri Mohamad Ali v. PP* [2010] 1 CLJ 610; *Wong Ai Sung v. Orix Credit Malaysia Sdn Bhd* [2007] 4 CLJ 52.

Brief Facts

[7] The plaintiff granted various banking facilities to the 1st defendant and the 2nd defendant is the guarantor. Amongst others are the overdraft facility and the foreign exchange contract limit facility which enable the 1st defendant to deal with the plaintiff in the FFEC. The letter of offer contains terms and conditions of the facilities as well as the manner on how the trading and/or dealing of future foreign exchange currency in forms of FFEC would be transacted as per Appendix II.

[8] It must be noted that it was agreed that the transactions were done by way of telephone in view of highly volatile changes caused by fluctuating exchange rates of the foreign currencies. The 1st defendant had transacted more than 30 FFECs with the plaintiff and all were honoured by the 1st defendant by the delivery before maturity of the relevant amount of US Dollar to the plaintiff except for 2 FFECs dated 14 July 1997 (CP 24984) (1st FFEC Contract) and 15 July 1997 (CP 25101) (2nd FFEC Contract) for sums of USD2.66million at the exchange rate of RM2.5455 to USD1 and USD5million at the exchange rate of RM2.559 to USD1 respectively together with roll-overs, which are now in dispute before this court.

[9] The alleged 1st FFEC was matured on 29 August 1997. The 1st defendant did not honour and it was rolled over on four occasions as follows:

(a) from 29 August 1997 to 5 September 1997 at the exchange rate of RM2.5455 to USD1 by way of Contract No: CP 24984A;

(b) from 5 September 1997 to 30 September 1997 at the exchange rate of RM2.546 to USD1 by way of Contract No: CP 24984B;

(c) from 30 September 1997 to 29 October 1997 at the exchange rate of RM2.5465 to USD1 by way of Contract No: CP 24984C; and

(d) from 29 October 1997 to 28 November 1997 at the exchange rate of RM2.5475 to USD1 by way of Contract No: CP 24984D.

[10] The alleged 2nd FFEC was matured on 30 September 1997. The 1st defendant failed to honour and it was rolled over on two occasions as follows:

(a) from 30 September 1997 to 29 October 1997 at the exchange rate of RM2.5595 to USD1 by way of Contract No: CP 25101A and

(b) from 29 October 1997 to 28 November 1997 at the exchange rate of RM2.5605 to USD1 by way of Contract No: CP 25101B.

[11] The two disputed FFECs were tape recorded and played back by the plaintiff to the 1st defendant on two occasions ie, 12 November 1997 and 26 November 1997. The 1st defendant denied giving any authority to Mr. Chin over 1st defendant to confirm the roll-over of the FFECs. Part of the contents of the letter read as follows:

> As revealed by your Ms Wee Lee Yung, she had attempted several times to call our Mr. Christopher Chai but to no avail as Mr. Chai was busy on the line. Instead, she chose to speak to our Mr. Chin who has no authority to confirm the roll-over of the FX Contracts. Ms. Wee Lee Yung did not contact Mr. Chai later to reconfirm the roll-over nor requested any return call from the latter as it was apparent from the playback of the voice of the recordings that Mr. Chin was totally confused and had no knowledge of the deal and was in no position to decide and confirm the rollover of the alleged FX Contracts.

Chronology of Events

[12] The 1st defendant contended that they first became aware of the 2nd FFEC and the roll-overs of the 1st and 2nd FFECs on 5 November 1997 based on the conversation with one Mr. Lim an officer of the plaintiff's branch in Lahad Datu. A statement indicating all existing FFECs outstanding was faxed to the 1st defendant.

[13] Upon receipt of the statement, Mr. Christopher Chai telephoned Mr. Lim on 6 November 1997 to clarify the same.

[14] On 7 November 1997, the 1st defendant wrote to the plaintiff's head office at Kuala Lumpur to inform plaintiff that the 1st defendant had no knowledge of the 1st and 2nd FFECs and that they could not trace such record in their book and the plaintiff had never indicated to Mr. Christopher and Mr. Chin the two FFECs.

First Play Back Over The Phone

[15] On 12 November 1997, the financial controller of the 1st defendant, Mr Chong Kan Hiung requested to listen to the tape recording of the tele-conversation relating to the two alleged FFECs. Arrangement was made and the tape recording was first played back over telephone at approximately 11am from plaintiff's Treasury Dealing Room in Kuala Lumpur to plaintiff's branch in Lahad Datu where Mr. Chong Kan Hiung came over the plaintiff's branch office and listened to the tape.

[16] The same arrangement was made for Mr. Christopher Chai and Mr. Chin at the plaintiff's branch office at about 2.30pm to listen to the tape recording on the very same day.

[17] On 12 November 1997, plaintiff had replied the said letter to explain the two transactions entered into and to give notice to the 1st defendant to pick up the two FFECs by 28 November 1997 failing which the plaintiff will close the FFECs at prevailing market rate and debit the 1st defendant's account for the amount due.

[18] On the same date, Mr. Christopher Chai had written a letter withdrawing the previous letter date 7 November 1997 pending investigation.

[19] Later, on 19 November 1997, the 1st defendant replied plaintiff's letter dated 12 November 1997 informing the outcome of their investigation by admitting the 1st FFEC entered into but disputing the 2nd FFEC entered. In the said letter, the 1st defendant stated that the 2nd FFEC would not have been entered into by the 1st defendant for the reasons that the trading depended on the sale of the palm oil and at that material time, the 1st defendant had sold all the palm oil products. Secondly, that no approval was given for the alleged 2nd FFEC.

Meeting Held And The Tape Re-Played Back

[20] A meeting was later held on 26 November 1997 at the 1st defendant's office whereby two audio recordings pertaining to the alleged tele-conversations when the contract was entered were played for all to listen.

[21] Pursuant to the meeting held in the 1st defendant's office, *vide* letter dated 27 November 1997, the 1st defendant wrote a letter to the plaintiff to reiterate that the 1st defendant cannot accept the full responsibility on the total exchange losses suffered. The 1st defendant also denied giving any authority to Mr. Chin to confirm the roll-overs of the FFECs. Part of the contents of the letter is as follows:

> As revealed by your Ms Wee Lee Yung, she had attempted several times to call our Mr. Christopher Chai but to no avail as Mr. Chai was busy on the line. Instead, she chose to speak to our Mr. Chin who has no authority to confirm the roll-over of the FX Contracts. Ms. Wee Lee Yung did not contact Mr. Chai later to reconfirm the rollover nor requested any return call from the latter as it was apparent from the playback of the voice of the recordings that Mr. Chin was totally confused and had no knowledge of the deal and was in no position to decide and confirm the rollover of the alleged FX Contracts.

[22] A certificate of indebtedness was issued by the plaintiff on 21 April 1998 on the amount outstanding together with further interest at the rate of 5% per annum over and above the bank's prevailing Base Lending Rate from 26 February 1998 until full and final settlement.

[23] The defendants' defence *inter alia* is as follows:

(a) the 1st defendant never entered into the 2nd FFEC and neither were there any instructions or orders given to the plaintiff in respect of the roll-overs;

(b) the alleged transactions were never confirmed by the plaintiff whether by facsimile or 'original advices' and it was never received by the 1st defendant;

(c) Mr. Chin has at all material times not been authorised by the 1st defendant to execute the FFEC for the 1st defendant only that Mr. Chai/Christopher Chai;

(d) Mr. Chin was pressured and hurried by Ms Wee;

(e) no mention or identification by the plaintiff's representatives of either the 1st or 2nd FFEC was made;

(f) plaintiff unlawfully and wrongfully debited the sum of RM7,910,414.84 from the 1st defendant's current account for the losses allegedly occurred upon the closing of 1st and 2nd FFEC;

(g) the 1st defendant never concluded a sale with the value of USD5mil especially in the month of July 1997 as there were already sales committed by the 1st defendant in that month;

(h) plaintiff failed to conclude that there was a contract concluded in respect of 2nd FFEC and the related roll-overs and that the 1st defendant had breached the same;

(i) plaintiff failed to subpoena Yung, Susan and Mr. Chin so as to prove primary evidence in favor of the plaintiff in respect of the formation of the contract;

(j) neither Yung nor Susan identify the voices in the recording and attended court;

(k) plaintiff failed to play the original recordings which were marked and tendered as P1-P7. P8 was an edited and extracted tape (see *Mohd Ali Jaafar (supra)*);

(l) P8 recording is inadmissible and/or must be treated with little weight; The audio recording is not clear, inaudible due to 'background noise' and there are many pauses and confusion as to whom plaintiff's representatives is talking to; There is never any definite identification of either Mr. Christopher Chai or Mr. Chin being on the phone; No testimony or evidence given that the recording device also identified the recipient of the telephone call nor any evidence to show that the telephone number was that of the 1st defendant;

(m) the transcripts do not indicate the relevant contact numbers, the exchange rate and the maturity period and is vague on the extended maturity dates;

(n) the confirmation advice, tracers and dealing slips are not contemporaneous documents; all the 'confirmation advice' do not bear the signature of the 1st defendant; no proof of posting nor fax confirmation slips are tendered; the

confirmation advice must be faxed and then later sent by post to the customer as stipulated in cl. 6.2(c) in the Appendix I to the Letter of Offer; tracers served as reminders for the 1st defendant on FFECs executed were not sent and no prove of posting the same; the dealing slips are self-serving documents and cannot constitute as evidence of FFEC and the related roll-overs being executed since they are internal documents within the plaintiff's 'Treasury and Dealing' department; many of these documents were sent out late whereby they would be redundant as the maturity date had already lapsed. During cross, PW1 proffered guess that this was due to financial crisis of 1997 where it must have been a very busy period for Forex Department; there are inconsistencies in the plaintiff's documents. Refer to 'Confirmation Advices' where they do not indicate either Mr. Christopher Chai or Mr. Chin at the 'Remarks: Deal done between';

(o) no provision under the Letter of Offer that allows the charging of interest on the FFEC facility because there was actually no loan of monies or that no actual disbursement of monies from the plaintiff until the purchase of the US Dollar from the 1st defendant; no interest had been agreed upon. It would be unjust and unconscionable if interest is chargeable on the FFEC facility; this court may grant a statutory interest from the date of the judgment pursuant to O. 42 r. 12 of the Rules of the High Court 1980;

[24] The plaintiff's submission *inter alia* is as follows:

(a) P8 is admissible as evidence as it falls within the definition of 'document' under s. 3(c) of the Evidence Act 1950 and as a secondary evidence under s. 63(b) of the Evidence Act 1950.

(b) P8 was played in the open court. It was clear and audible. Transcription has been marked as exh. P10.

(c) the evidence in exh. P1-P7, P8, P10 and P20 was corroborated with the testimonies given by the plaintiff's witnesses and defendants' letter dated 27 November 1997;

(d) PW1 and PW3 had identified the voices of Susan and Yung. Defendants' counsel did not put to the plaintiff's witnesses that that those are not voices of Yung and Susan. Thus it is deemed to be admitted (see *Wong Swee Chin (supra)*);

(e) PW2 had identified the voices of Mr. Christopher Chai (DW3) and Mr. Chin since PW2 was a branch manager of plaintiff's branch in Lahad Datu and known them personally;

(f) P8 was 'blur' is a statement from the bar and does not constitute evidence;

(g) 1st defendant admitted to the indebtedness as per 1st defendant's letter dated 27 November 1997

(h) the plaintiff's claim is corroborated by documentary evidence ie, the 'Original Advices', 'Fax Confirmation Slip', 'Dealing Slips' and 'Tracers';

(i) the confirmation documents are admissible under s. 32(1)(b) of the Evidence Act 1950 as they are documents which are made in the ordinary course of plaintiff's business;

(j) Section 114(f) of the Evidence Act 1950 applies; defendants failed to rebut the presumption; defendants' witnesses are not credible;

(k) DW3's oral evidence contradicted his own earlier sworn affidavit used to oppose plaintiff's summary judgment's application;

(l) no adverse inference against plaintiff for not calling Susan and Yung due to reasons that plaintiff does not suppress any material evidence and plaintiff had tried to locate their whereabouts but failed (see *Munusamy (supra)*);

(m) Mr. Chin had previously transacted 5 FFEC with the plaintiff's dealer all of which were honoured by 1st defendant. Mr. Chin had been working under the supervision of DW3;

(n) the defendants failed to call Mr. Chin as witness so as to draw an adverse inference against 1st defendant. Section 114(g) of the Evidence Act applies;

(o) the defendants are estopped from denying that Mr. Chin had the authority to transact in the FFEC on behalf of 1st defendant since defendants had never at anytime informed plaintiff orally or in writing that Mr. Chin was not orally authorised by 1st defendant to transact;

(p) no evidence was led by the defendants that Mr. Chin was taken on any disciplinary action for transacting the disputed FFECs;

(q) FFECs were concluded over the telephone. The Original Advices, Tracers do not form FFEC; all 30 or more FFECs were honoured by 1st defendant;

(r) the Letter of offer allows interest to be charged on an overdraft facility, it is repayable upon demand, it reserves the plaintiff's right to debit the 1st defendant's account to recover loss suffered by plaintiff due to unwillingness of 1st defendant to honour the FFEC. Refer to Part X (k) of the Letter of Offer;

(s) Part XI(d) of the Letter of Offer also provides that any certificate by plaintiff as to the amount outstanding, due and payable shall be final and conclusive; the claim for the loss is based on the Certificate of Indebtedness issued by the plaintiff to the 1st defendant; Alternatively, if the court does not allow the interest chargeable plaintiff claims damages amounting to RM7,637,020 as demanded and an interest of 8% per annum on the sum from 3 December 1997 until judgment as provided by s. 11 of the Civil Law Act 1956 and an interest of 4% per annum under O. 42 r. 12 o the Rules of the High Court 1980.

(t) The corporate guarantee was an indemnity under s. 77 of the Contracts Act 1950; 2nd defendant is liable to plaintiff for the losses and interest thereon (see *Sia Siew Hong and Chung Kiaw Bank Ltd (supra)*); no evidence lead by the defendants during trial to show that 2nd defendant is not liable under the guarantee.

[25] I have heard the evidence, read the documents and submission of the parties in detail. I am grateful to both counsels for having placed a detailed submission and also for having highlighted to the issues relating to evidence. I do not wish to repeat the same save to address the core issues. After having given much consideration to the submission of the learned counsel for the defendants, I take the view the plaintiff's claim for damages must be allowed. My reasons *inter alia* are as follows:

(a) In the instant case five witnesses gave evidence for the plaintiff and four witnesses for the defendants. The plaintiff's witnesses were forthright despite severe cross examination and their evidence which was consistent with the contemporaneous

documents was not shaken. I cannot say the same for the defendants' witnesses as their evidence was evasive and their version lacks credibility. In addition there is much merit in the plaintiff's submission that DW3's evidence in fact contradicted his own earlier sworn affidavit used to oppose plaintiff's summary judgment. The defendants' submission was silent on this issue.

(b) The defendants have placed a lengthy submission on admissibility of tape recording. I do not find merit and in my view taking into consideration the factual matrix of the case it is purely a sham argument and this case can be decided even in the absence of the tape recording evidence as the issues raised in defence and in court was not one taken at the earliest opportunity. In fact the defendants had never objected after having had the opportunity to hear the tape recording the relevant voice, in the manner taken up at the trial. In addition Mr. Chin was not called as witness and in my view is fatal.

(c) It must be noted that presence of Mr. Chin in the working structure was not in dispute at the material time and what was in dispute was his authority. The defendants' defence attempting to deny the voice of 'Chin' in the tape recording in my view is an afterthought which in essence destroys the credibility of the defendants' case. This factor is damaging to the defendants' case and the court is obliged to take into consideration this fact pursuant to s. 114 of the Evidence Act 1950.

(d) The nature of the contract between the parties is one related to oral agreement and they have, voluntarily and knowing the risk of such oral agreement can be subject matter of dispute, entered into the agreement. In addition evidence will show that both parties have not strictly followed the procedural safe guards pursuant to the said agreement in respect of the contracts which are not in dispute. The defendants' complaint that the procedural safeguards had not been complied with does not carry much weight on the factual matrix of the case as the primary issue is whether the defendants are liable.

(e) In the instant case the plaintiff had set out the 32 transactions and the persons who have dealt with it in encl. 109 pp. 36 and 37. What are in dispute are the two

transactions as stated above. The main contentions of the defence are that it is not Mr. Chin's voice and that Mr. Chin has no authority. The transactions were duly recorded as per the bank's procedure and practice in relation to such oral transaction and it was played to the concerned parties as early as 5 November 1997 but then there was no protest that it was 'Chin' or wrong person and or its like. If it is a genuine defence any reasonable person would have thought the protest was a must and subsequent police report will be in order to deny liability. That did not take place. It is also essential to note that many correspondences was exchanged after the hearing of the tape inclusive of solicitors demand but no protest was made in the manner raised in court or the submission or for that matter the quantum. In fact, the managing director of the defendants, Mr. Kwan Ngen Chung, DW2 wrote a letter dated 27 November 1997 to settle the matter on terms (see encl. 108, pp. 84 to 86) and that part of the letter reads as follows:

> If the alleged FX Contracts and the rollover had been properly transacted and communicated to us earlier, we would be able to take remedial action to minimize the potential losses and we would have concluded the contract prior to maturity dates. We would therefore be only willing to absorb losses suffered by the two FX Contracts up to their respective maturity dates ie, for CP 24984D for USD2,660,000 up to 29th August 1997 and CP 25101B for USD5,000,000 up to 30th September, 1997.

[26] The learned counsel for the defendants has placed a lengthy submission on evidence and admissibility. I must say here that this is not a criminal case. I also do not find merit in the learned counsel's submission that the recording was blur and inaudible and their interpreter was not able to transcribe. I do not see any reason why it could not be transcribed as I had the opportunity of hearing it and the said complaint by the defendants in my view is only to blur the plaintiff's case.

[27] I find much merit in the submission of the learned counsel for the plaintiff on liability and quantum of damages. Taking the evidence as a whole I have no reason to disbelieve the plaintiff's version. It is my finding that defendants are liable and damages with interest will be in order.

[28] I agree with the learned counsel for the defendants that the transaction was not a facility and in consequence the plaintiffs are not entitled to contractual interest. I also have given much consideration to the submission that:

> 58.2 This sum of RM7,637,020.00 even if taken to be true purports to be losses for both FFECs. It is reiterated that only the 2nd FFEC and the alleged roll-overs are in issue in this trial. The memo at page 137 is therefore is of no assistance to this court as it does not segregate the 1st and 2nd FFECs nor the respective roll-overs.
>
> 58.3 As elucidated by counsel for the plaintiff at the trial the exchange rate for FFECs is in consistent fluctuation throughout the day and from day to day. Each FFEC and each respective roll-over is a separate contract. The plaintiff thus has to prove the formation of the 2nd FFEC and each roll-over for both the 1st and 2nd FEECs.
>
> 58.4 Furthermore, the 1st FFEC is proceeding for assessment of damages. Any order here in respect of the 1st FFEC would be to usurp the said process and would be in contradiction of the order for such assessment of damages.

[29] Relating to the previous assessment order before registrar, I do not see any reason why the court in this case cannot place some degree of finality to the claim. I do not see how the defendants will be prejudiced, taking into consideration the case has been filed as early as 1998.

[30] For the reasons stated above I allow the plaintiff's claim for the sum of RM7,637,020 with interest at 4% per annum from the date of filing to the date of the judgment and interest at the rate of 4% from the date of the judgment until the date of realisation. The defendants to pay costs in the sum of RM100,000. The plaintiff to pay allocatur for cost before the extraction of the order for costs. The deputy registrar to issue certificate for the allocatur.

I hereby order so.